Supreme Court, U. S.
FILED
JUN 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1647

In the Matter of FRANK C. McGIRR,

Petitioner,

against

DIVISION OF VETERANS AFFAIRS, EXECUTIVE DEPARTMENT, STATE OF NEW YORK, FRANK V. VOTTO, DIRECTOR, and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Respondents.

BRIEF IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General
ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
History of the Case	2
The Opinion of the New York Court of Appeals	4
REASONS FOR DENYING CERTIORARI	
Petitioner failed to timely pursue his New York remedies to review his deemed resignation as a veterans counselor and this petition raises no federal constitutional question	5
Conclusion	7
Cases:	
Arnett v. *Kennedy,* 416 U.S. 134 (1974)	6
Mathews v. *Eldridge,* 424 U.S. 319 (1976)	6
Matter of Sanford v. *Rockefeller,* 35 N.Y. 2d 547, 364 N.Y.S. 2d 450, 324 N.E. 2d 113 (1974), *appeal dismissed* 421 U.S. 973	6, 7
Matter of Williamson v. *Fermoile,* 31 App. Div. 2d 298 N.Y.S. 2d 557 (4th Dept. 1969) *aff'd* 26 N Y 2d 731, 309 N.Y.S. 2d 35, 257 NE 2d 285 (1970)	5

PAGE

Shuttlesworth v. *Birmingham*, 382 U.S. 87, 91 (1965) 6

Other Authorities:

Federal

28 U.S.C. 1257(3) 2

U. S. Constitution, Fourteenth Amendment 3

New York State

New York Civil Practice Law and Rules

Section 217 ..... 4, 5

Article 78 ..... 3, 5

New York Civil Service Law

Section 54 3

Section 75 ..... 3, 6

Section 76 4

Rule 5.3(d) 2, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1647

In the Matter of FRANK C. McGIRR,
Petitioner,

against

DIVISION OF VETERANS AFFAIRS, EXECUTIVE DEPARTMENT, STATE OF NEW YORK, FRANK V. VOTTO, DIRECTOR, and NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,
Respondents.

BRIEF IN OPPOSITION

Opinions Below

The opinion of the New York Court of Appeals is reported at 43 N Y 2d 635, 374 N E 2d 123, 403 N.Y.S. 2d 212 (1978), and appears in the petition as Appendix A. The opinion and order of the New York Supreme Court, Appellate Division, Second Judicial Department is reported at 56 App. Div. 2d 653, 392 N.Y.S. 2d 44 (2d Dept. 1976), and appears in the petition as Appendix B. The opinion of the New York Supreme Court, Richmond County is unpublished and appears in the petition as Appendix C. The opinion of the New York Supreme Court, Appellate Division, Second Judicial Department is reported at 47 App.

Div. 2d 541, 363 N.Y.S. 2d 107 (2d Dept. 1974), and appears in the petition as Appendix D. The opinion of the New York Supreme Court, Richmond County is unpublished and appears in the petition as Appendix E.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257(3).

Question Presented

Does petitioner's claim that he was entitled to a hearing prior to his termination as a New York State veterans counselor raise a constitutional question where the New York Court of Appeals did not review the merits of petitioner's claim because he failed to institute judicial proceedings in the New York courts within the limitation period prescribed by State law?

History of the Case

On January 12, 1972, petitioner was informed by Frank V. Votto, Director of the Division of Veterans Affairs, that he had been separated from his position as a State veterans counselor in accordance with New York State Civil Service Department Rule 5.3(d) (McKinney 1973) which provided that when "an employee is absent without leave and without an explanation therefor for a period of 10 work days, such absence shall be deemed to constitute a resignation effective on the date of the commencement of such absence."

On February 9, 1972, in response to a letter dated January 21, 1972 mailed by petitioner to Mr. Votto, Mr. Votto informed petitioner that this determination was not subject to change and that if he disagreed, he had his right to legal recourse.

On February 15, 1972, petitioner filed a letter of appeal with the New York Civil Service Commission. On June 12, 1972, the Civil Service Commission informed petitioner that the dismissal was not subject to review.

Thereafter, petitioner instituted a proceeding under New York Civil Practice Laws and Rules Article 78 (McKinney 1963) to overturn his resignation by service of a petition on the Department of Veterans Affairs on August 25, 1972 and on the Department of Civil Service on September 8, 1972. Petitioner claimed, *inter alia*, that as a tenured civil service employee he was entitled to a hearing under the Fourteenth Amendment prior to his involuntary resignation. He also argued that he was entitled to a hearing pursuant to New York Civil Service Law § 75 (McKinney 1973) which provides for an administrative hearing when a permanent employee is discharged from his job for disciplinary reasons. He sought reinstatement to his position as a veterans counselor and backpay.*

On October 6, 1972 respondents moved to dismiss the petition as time barred.**

---

* Petitioner is over the mandatory retirement age of seventy applicable to his position as a veterans counselor and the reinstatement issue is now moot. New York Civil Service Law § 54 (McKinney 1973).

** This proceeding has a lengthy procedural history. On January 23, 1973, the Richmond County Supreme Court denied respondents' motion to dismiss the appeal. An interlocutory appeal was taken to the New York Supreme Court, Appellate Division, and on October 15, 1973 the order was affirmed. Thereafter, on April 2, 1974 the Richmond County Supreme Court granted petitioner summary judgment. On January 29, 1975, the New York Supreme Court, Appellate Division reversed and remanded to the Richmond County Supreme Court for a hearing. A hearing was held and the Richmond County Supreme Court granted petitioner judgment on February 23, 1976. The New York Supreme Court, Appellate Division reversed and dismissed the petition on February 28, 1977. Petitioner then appealed to the New York Court of Appeals.

The Opinion of the New York Court of Appeals

The New York Court of Appeals did not reach the merits of petitioner's constitutional and statutory claims because it found that petitioner had not complied with the four month limitation period under New York law for instituting a petition seeking review of his termination. The Court held that when petitioner learned on February 15, 1972 that the Division of Veterans Affairs would not reinstate him to his position as a veterans counselor, the time within which judicial review had to be requested was set in motion. When the proceeding was commenced against the Division on August 25, 1972, the four month limitation period, applicable to this type of review under New York CPLR 217 (McKinney 1972), had already expired.

Insofar as petitioner sought to appeal to the Civil Service Commission, the Court of Appeals held that even assuming *arguendo* only that an appeal to the Commission from petitioner's resignation was available, it was taken too late. New York Civil Service Law § 76(1) (McKinney 1973) provides that an administrative appeal must be filed within 20 days after service of written notice of the determination sought to be reviewed. Petitioner received written notice of the original determination as early as January 12, 1972. His notice of appeal to the Civil Service Commission was not served before February 10, 1972. It was, thus, incontrovertible that the appeal was not taken within the twenty day period.

REASONS FOR DENYING CERTIORARI

Petitioner failed to timely pursue his New York remedies to review his deemed resignation as a veterans counselor and this petition raises no federal constitutional question.

The litigation by petitioner was disposed of as untimely under New York statute.

Petitioner, an employee of the State Division of Veterans Affairs, had been dismissed for unexcused absences for more than ten days under a Department of Civil Service Rule which deemed such absences to amount to a resignation. Petitioner sought reconsideration from the employer, the Division of Veterans Affairs, which was unsuccessful. After attempting an appeal to the State Civil Service Commission, he commenced a proceeding to review the validity of the termination of his employment under New York Civil Practice Law and Rules Article 78 (McKinney 1963). The denial of reconsideration by the Division of Veterans Affairs was by letter mailed on February 9, 1972 and the judicial proceeding was commenced on August 25, 1972, over six months later.

Under New York law, a proceeding to review a dismissal must be commenced within four months of the official action of dismissal or a demand for reinstatement in case of a claimed illegality (New York CPLR 217) (McKinney 1972). This period of limitations is mandatory and jurisdictional. No court can extend this period of limitations. *Matter of Williamson* v. *Fermoile,* 31 App. Div. 2d 438, 298 N.Y.S. 2d 557 (4th Dept. 1969), *aff'd* 26 N Y 2d 731, 309 N.Y.S. 2d 35, 257 N E 2d 285 (1970). The Court of Appeals here held that the request for reconsideration served as a demand for reinstatement, the agency's denial of reconsideration constituted a rejection of such demand and the four month period within which judicial review had to

be requested was set in motion. In consequence, the proceeding was untimely under New York law and could not be maintained.

The New York Court of Appeals also pointed out that even assuming *arguendo* only that an appeal to the Civil Service Commission was appropriate after a Rule 5.3(d) resignation, such an appeal must be filed within 20 days. Again, petitioner failed to comply with this procedural rule.*

This disposition of the judicial proceeding upon state law questions is binding, *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 91 (1965), and is dispositive of the present application.

Although the Court of Appeals, therefore, did not reach the merits, prior thereto, the Appellate Division had considered petitioner's claim that he was entitled to a hearing on his termination. The Appellate Division held that in the present case the petitioner had a full trial before the trial court and had thereby received full due process of law. That court found the facts against the petitioner—that, in fact, he had inexcusably absented himself from his place of employment for an extended period (Florida) without leave and without explanation as required by the Civil Service Rule. In view of the full trial accorded petitioner, it would be an impotent act to suggest the lurking of a due process question, even apart from the bar of the period of limitations. The fact that the hearing followed the imposition of discipline for the extended absences would not warrant any constitutional challenge. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976); *Arnett* v. *Kennedy,* 416 U.S. 134 (1974); *Matter of Sanford* v. *Rockefeller,* 35 N.Y.

* In point of fact no such appeal lies. The Civil Service Commission only reviews disciplinary proceedings upon an administrative record after a hearing held pursuant to New York Civil Service Law § 75 (McKinney 1973). At bar, petitioner was attacking a rule of the Department of Civil Service and his sole remedy was a judicial proceeding to have the rule declared invalid.

2d 547, 364 N.Y.S. 2d 450, 324 N.E. 2d 113 (1974), *appeal dismissed* 421 U.S. 973.

In sum, petitioner, who was represented by an attorney at least as early as February 10, 1972, failed to timely pursue his New York remedies and this application raises no constitutional claim for this Court to review.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be denied.

Dated: New York, New York
June 20, 1978

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Respondents

Samuel A. Hirshowitz
First Assistant Attorney General
Arlene R. Silverman
Assistant Attorney General
of Counsel